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No. 86-557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL SCOTT,

Petitioner,

v.

RHODA MANDEL GREENBERG, EXECUTRIX of the Estate of JENNIE MANDEL BARNETT, deceased (Bryan B. Johnson, Administrator dbn WWA substituted), and ENID MANDEL RESNICK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state trial court may constitutionally deny a party's requested continuance when, in view of the totality of circumstances known to the trial judge, it is apparent that such party's actions theretofore have been dilatory, evasive and uncooperative; when such party fails to demonstrate the nature and substance of the evidence he would produce were the continuance granted; and when such party fails to indicate the prejudice that would result to him were the continuance denied.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Rhoda Mandel Greenberg, Executrix of the Estate of Jennie Mandel Barnett, deceased (Bryan B. Johnson, Administrator dbn WWA substituted) and Enid Mandel Resnick respectfully request this Court to deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeals of Ohio, Tenth Appellate District (hereinafter "Court of Appeals") which is reproduced beginning at page A-1 of Petitioner's Petition for Writ of Certiorari.

STATEMENT OF FACTS AND OF THE CASE

Unfortunately, Petitioner's Statement of Facts is somewhat incomplete and inaccurate.

This action was commenced on February 9, 1983, as a will contest in the Franklin County, Ohio Court of Common Pleas, Probate Division. In his Complaint, Petitioner (plaintiff below) alleged that the decedent's Last Will and Testament dated March 17, 1980, and admitted to probate by the Court on November 5, 1982, should be declared invalid and set aside.

Petitioner's complaint was based upon two theories. First, that the decedent lacked the testamentary capacity to make a Will at the time her Will was executed on March 17, 1980, and, second, that undue influence was exerted upon the decedent at the time of the making of said Will. No allegation was contained in the complaint to the effect that "defendent Rhoda Mandel Greenberg and defendent Enid Resnick caused the untimely death of the decedent, Jennie Mandel Barnett, and were not entitled under Ohio law to take under the purported Will admitted to probate, under any prior wills, or under the statute of descent and distribution." (Petition p. 11).

After much delay, the case was set for trial by jury on September 10, 1985. At a conference with the trial judge in chambers on the morning of September 9, 1985, the day prior to the trial, counsel for the Petitioner orally moved the Court for a continuance of the jury trial for the reason that Petitioner Paul Scott was unable to attend the trial due to medical reasons. This motion was opposed by counsel for Respondents for reasons of timeliness and repeated dilatory tactics of the Petitioner. The Court overruled said motion.

When the case was called for trial on September 10, 1985, Petitioner was not present in the courtroom. Counsel for Petitioner again moved the Court, on the record, for a continuance of the trial. Respondents'

counsel again opposed the motion because of Petitioner's past history of delay. The Court likewise overruled that motion.

A review of the record reveals a history of delay and non-cooperation on Petitioner's part which is stated in greater detail in Respondents' argument set forth hereinafter. Petitioner contends that the trial court erred to his prejudice in refusing to grant a continuance of the trial. Respondents maintain that such is not the case; rather the court did not abuse its discretion or violate Petitioner's constitutional rights in refusing the continuances after taking into account Petitioner's prior actions.

REASONS WHY THE WRIT SHOULD BE DENIED

Prior decisions of this Court and lower courts are controlling and support the opinion below. Examination of all pertinent circumstances known to the trial judge makes it clear that the denial of Petitioner's motion for continuance violated none of Petitioner's constitutional rights.

The record in this case reflects numerous documented actions whereby Petitioner sought delay herein through dilatory, evasive and uncooperative conduct.

First, the record reflects that discovery interrogatories submitted to Petitioner on June 22, 1983 were not answered until Respondents were forced to file a motion to compel answer to interrogatories on November 17, 1983.

Later, On December 19, 1983, Respondents filed a notice to take the depositions of Petitioner and other persons. Due to Petitioner's lack of cooperation, Respondents were required to file a motion on April 4, 1984 for an order to apply sanctions pursuant to Ohio civil procedure because of Petitioner's failure to appear for deposition. This further necessitated a judgment entry being filed on May 14, 1984 ordering Petitioner and other persons to appear on June 7, 1984 for depositions or suffer dismissal of the action with prejudice.

In addition, the record contains an entry filed March 7, 1984 scheduling the case for trial on May 17, 1984. Because Petitioner failed to appear in Franklin County, Ohio for depositions until the trial court ordered him to appear under threat of dismissal of the case with prejudice, the May 17, 1984 trial date had to be vacated. On July 3, 1984, Petitioner applied for and was granted an indefinite continuance pending his pursuit of an action against the hospital where the decedent died and against Respondents Greenberg and Resnick and others. On May 10, 1985, the matter was set for pre-trial before the Court at which time the trial judge, in his discretion,

proceeded to set the matter for trial on September 10, 1985.

Additionally, at no time did Petitioner's counsel proffer to the trial court the nature or substance of the evidence Petitioner would have given had he been present; nor did he indicate how Petitioner would have been prejudiced by his absence from the trial.

It is elementary that the matter of a continuance rests in the sound discretion of the trial court. Ordinarily, that action is not reviewable. Thus, it would take an "extreme case" to make the denial of a continuance a violation of due process. *Franklin v. South Carolina*, 218 U.S. 161, 168 (1910).

In view of that principle, this Court has held that there are no mechanical tests for deciding whether the denial of a continuance is so arbitrary as to violate due process. That determination can only be made based on the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Ungar v. Sarafite*, 376 U.S. 575, 589-90 (1964).

The trial court in *Ungar* had denied a continuance to a witness who contended, among other things, that he was "not in any physical or mental condition to testify." 376 U.S. at 580. The witness requested an opportunity to present medical and expert testimony that would show him not guilty of the contempt with which he was charged (which apparently he never produced). This Court, in holding no violation of due process, found it significant that the witness never revealed the name of the expert witness he expected to call or the substance of the testimony he supposedly would have given. 376 U.S. at 590-91. Whether or not another judge would have granted a continuance under the circumstances does not raise a constitutional issue. 376 U.S. at 591. See, also, *Hardy v. United States*, 186 U.S. 224, 227 (1902) (it is not improper for a trial court to consider

the movant's motives, such as his desire to delay or postpone the trial for tactical reasons, in ruling on a motion for continuance).

Lower courts have found no violation of due process or abuse of discretion if a party does not indicate to the trial court the nature and substance of the evidence he would produce if his request for continuance were granted. *United States v. Jones*, 369 F. 2d 217, 220 (7th Cir. 1966), *cert. denied sub nom., Watkins v. United States*, 386 U.S. 944 (1967); *Cash v. Murphy*, 339 F. 2d 757, 758 (5th Cir. 1964) (continuance requested for medical reasons denied). Some courts have held that the movant must demonstrate the prejudice that would result to him were the continuance not granted. *United States v. Jones*, 730 F. 2d 593, 596-97 (10th Cir. 1984); *Smith v. Daniel*, 46 F. 2d 740, 742 (6th Cir.) *cert. denied*, 283 U.S. 852 (1931) (continuance requested for medical reasons denied). Specifically, a movant's rights are held to be not violated when his requested continuance for medical reasons is denied, if the record reflects the movant's history of dilatory tactics. *Speers Sand & Clay Works v. American Trust Co.*, 52 F. 2d 831, 832 (4th Cir. 1931) *cert. denied*, 286 U.S. 548 (1932); *Druckman v. Forsyth Furniture Lines, Inc.*, 22 F. 2d 59,60, *rehearing denied*, 23 F. 2d 493 (4th Cir. 1927).

The Court of Appeals below, in holding against Petitioner, found it significant that Petitioner's counsel at no time indicated or proffered to the trial court the nature and substance of the evidence Petitioner would have given had the requested continuance been granted; and, further, that counsel did not demonstrate how Petitioner was prejudiced by the denied continuance. (Petition A-6, A-7).

CONCLUSION

At the time of trial, the case had been pending approximately thirty-one months. In keeping with the court's objective of dispensing justice without needless delay and after considering Petitioner's numerous instances of dilatoriness and non-cooperation, Respondents submit that the trial court did not abuse its discretion or violate Petitioner's constitutional rights in overruling the latter's requests for continuances. Respondents, therefore, respectfully urge the Court to deny the requested writ of certiorari.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing, Respondents' Brief in Opposition have been served upon petitioner, Paul Scott, by mailing such copies to the office of petitioner's counsel of record, Ronald Podolsky, 15 Park Row, New York, New York 10038, by U.S. Mail First Class postage prepaid, this 31st day of October, 1986.

I further certify that all parties required to be served have been served.

JOHN E. HYKES
Attorney for Respondents